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In The

Supreme Court of the United States

October Term 1960

No. 956 100

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

KOPPERS COMPANY, INC.,
Appellant

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS APPEAL

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

Commonwealth of Pennsylvania,
Appellee

v.

Koppers Company,
Appellant

MOTION TO DISMISS APPEAL

Appellee moves that the appeal from the final judgment of the Supreme Court of Pennsylvania in the present case be dismissed on the grounds that (a) the appeal does not present any substantial Federal questions; (b) the question which the appellant is seeking to have reviewed under Question 2 was not properly raised before the court below; and (c) that portion of the judgment of the court below which the appellant seeks to review under Question 3 rests on an adequate non-Federal basis.

STATEMENT

In the present case, the courts below[1] sustained the imposition of the Pennsylvania corporate net income tax against the appellant for 1953.

The Pennsylvania Corporate Net Income Tax Act imposes a "State excise tax * * * for the privilege of doing business in this Commonwealth."[2] The tax has as its base net income as returned to and ascertained by the Federal Government, subject to certain adjustments and allocations not material here. The resulting base is then apportioned by the use of 3 fractions, i.e., (1) tangible property, (2) wages and salaries, and (3) gross receipts.[3] The tax statute, as construed by the State Courts, required the inclusion of the gross proceeds of securities in the third or gross receipts fraction.[4]

The appellant here objected to the inclusion of the gross proceeds of securities in the gross receipts fraction, contending that this so increased the taxable proportion as to render the tax unconstitutional. The evidence before the court below showed that the inclusion of the gross proceeds of securities increased the combined allocation percentage from approximately 30% to approximately 34.6%. The court be-

[1] 71 Dauphin County Report 73 (1957); 397 Pa. 523, 156 A. 2d 328 (1959), Jur. St. Appendix B, pp. 23-31.

[2] §3 of the Act of May 16, 1935, P. L. 208, as amended, 72 P.S. §3420 (c), Jur. St. App. A, p. 22.

[3] Jur. St., pp. 19, 20, 21.

[4] Jur. St., p. 26.

low found that the appellant had "produced no facts showing an unreasonable distortion of income."[5]

The appellant also contends that the inclusion in the gross receipts fraction of the gross proceeds of the United States securities held by it resulted in an unconstitutional discrimination against such United States securities. The court below held that (1) the appellant had waived this question; (2) the tax is not imposed on income from Federal securities; and (3) proceeds of *all* securities are included in the gross receipts fraction.[6]

The appellant also complains about the action of the trial court in concluding that certain evidence before the court was irrelevant and immaterial. The Supreme Court of Pennsylvania held that the appellant had not been injured, and that the ruling was simply a decision that those facts had ultimately proved immaterial, in view of the legal conclusions previously stated.[7]

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[5] Jur. St., p. 29.
[6] Jur. St., p. 30.
[7] Jur. St., pp. 30, 31.

QUESTIONS PRESENTED

1. Under a State excise tax statute which measures business activity in Pennsylvania by the use of three apportionment fractions, and requires the inclusion in the gross receipts fraction of the gross proceeds of securities owned by the taxpayer, has the appellant sustained its burden of proving that such inclusions violate the Due Process Clause of the Constitution of the United States, when the record shows only an increase from 30% to 34.6% in the total allocation percentage of appellant's taxable income in Pennsylvania?

2. Did the inclusion of the gross proceeds of the appellant's United States securities in the gross receipts fraction result in an unconstitutional discrimination against such securities?

3. Did the State courts err in ruling that certain facts in the record were irrelevant and immaterial after having concluded that the tax levied against the appellant was not unconstitutional?

SUMMARY OF ARGUMENT

The appellant is seeking a review by this Court of the decision of the Supreme Court of Pennsylvania, which construed the Pennsylvania corporate net income tax apportionment formula as reasonable. The appellant made no attempt to show by what percentage its business activity in Pennsylvania should have been measured, but merely showed that the addition of the gross proceeds of the maturities of securities to the gross receipts fraction increased the overall apportionment by 4.6%.

This increase does not present a substantial Federal question of due process.

Moreover, there is no basis for appellant's contention that, by including the gross proceeds of its Federal securities in the gross receipts fraction, there has been discrimination against such Federal securities. On the contrary, the gross proceeds of all securities issued by the Federal, State or local government or by private corporations, are included without discrimination in the gross receipts fraction. Moreover, appellant did not properly raise this question before the Supreme Court of Pennsylvania.

The appellant also complains of a ruling on evidence made by the trial court. However, this ruling did not violate any of appellant's rights, because it was merely confirmatory of the decision of the court below, and did not prejudice the appellant.

ARGUMENT

1. FEDERAL CONSTITUTION REQUIRES ONLY A REASONABLE APPORTIONMENT

(Question 1)

If a rule of apportionment is applied for State excise tax purposes, the only requirement is that the formula be reasonable: *Butler Bros. v. McColgan*, 315 U. S. 501 (1942); *Norfolk & Western Ry. Co. v. North Carolina*, 297 U.S. 682, 688 (1936). Some rather narrow formulae for an allocation of income have been upheld, e.g., (a) a proportion of the taxpayer's real and intangible personal property located within the State: *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); (b) a proportion of real and tangible and intangible personal property; *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U.S. 281 (1924).

Pennsylvania uses the three-fraction formula held reasonable in *Butler Bros. v. McColgan*, supra (315 U. S. 501). This formula was upheld in *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 184 A. 37 (1936).

A state statute will be held invalid only where there has been an unreasonable distortion of income. As said in *Butler Bros. v. McColgan*, supra (315 U.S. 507), "one who attacks a formula of apportionment

carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed".

In *Ford Motor Co. v. Beauchamps,* 308 U.S. 331 (1939), this Court recognized the apportionment doctrine, while sustaining an allocation nearly eight times the book value of the taxpayer's local property.

See also *International Harvester Co. v. Evatt,* 327 U.S. 416, 422 (1947), where this Court declared that "rough approximation rather than precision is sufficient".

In order to prove that the 34.6% fraction was unreasonable, appellant would have had to show that its business activity attributable to Pennsylvania was substantially less than this amount. It does not aid the appellant to pin-point an allegedly disproportionate result in one of the three fractions. The reason for having three fractions is to average out and compensate for the disproportionate result that would follow in many cases if only one or even two allocation fractions were used.

The only decision of this Court holding that the apportionment formula of a State had reached an arbitrary result in income taxation was *Hans Rees' Sons, Inc. v. North Carolina,* 283 U.S. 123 (1930), where the evidence showed that the income having its source in the operations of the taxpayer within the State of North Carolina was 17%, whereas the State tax formula allocated for the four years in question respectively 83+%, 85+%, 66+% and 85%. Such an increase of 68% in that case could scarcely be

compared with the 4.6% increase in the allocation on which the present litigation is based.

It is entirely possible that the 34.6% used in the resettlement is too low as a measure of the appellant's business activity in Pennsylvania. The appellant has offered nothing to refute this possibility. In commenting on this, the Pennsylvania Supreme Court said: "* * * appellant has produced no facts showing an unreasonable distortion of income here".[8]

[8] Jur. St., p. 29.

2. COMMONWEALTH'S TAX DOES NOT DISCRIMINATE AGAINST THE APPELLANT'S UNITED STATES SECURITIES (Question 2)

Appellant is here contending that the inclusion of the proceeds from maturities of Federal securities in the gross receipts fraction results in an unconstitutional discrimination against obligations of the United States.

As pointed out by the Supreme Court of Pennsylvania, the appellant did not raise this question in its statement filed pursuant to rule 40 of the Rules of that Court, and "may be deemed to have waived it."[9] Thus, under the laws of Pennsylvania, the question was not properly before the appellate court below.

Moreover, it should be noted that the act does not tax income from Federal, State or municipal securities. On this point, the Pennsylvania Supreme Court said:[9]

> "* * * Such a tax while simultaneously excluding the income from state and municipal securities, would be discriminatory and has been so held. Commonwealth v. Curtis Publishing Co., 363 Pa. 299, 69 A. 2d 410 (1949). Therefore, income from all three sources is excluded from the income taxed. * * *"

Finally, as the court below pointed out,[9] proceeds from all securities in which the corporation invests are included in the gross receipts fraction, thus avoiding any trace of discrimination.

[9] Jur. St., p. 30.

3. RULING THAT CERTAIN FACTS WERE IRRELEVANT AND IMMATERIAL DID NOT INJURE APPELLANT

(Question 3)

Appellant is here contending that the trial court erred in ruling that certain facts, agreed to by the parties in the Stipulation of Facts, were irrelevant and immaterial. Appellant does not indicate what section of the United States Constitution was allegedly violated by this ruling.

Nevertheless, the contention is adequately answered in the opinion of the Supreme Court of Pennsylvania, where it was stated:[10]

> "• • • All of the matters in question were contained in a stipulation of facts entered into by the parties and placed before the court. The Commonwealth's objection to their relevancy and materiality was sustained *only after the court had given its decision on the law and had considered the facts contained in the stipulation.* The court's exclusion of these facts pursuant to the Commonwealth's request was, therefore, simply a decision that those facts had ultimately proved immaterial in view of the legal conclusions stated. It in no way prejudiced the appellant." (Emphasis supplied)

In view of this adjudication, there can be no basis for review by this Court under Question 3.

[10] Jur. St., pp. 30, 31.

No substantial Federal questions have been presented by the Appeal in the present case. Accordingly, the appeal should be dismissed.

Respectfully submitted,
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